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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

CRUISE LINES INTERNATIONAL ASSOCIATION ALASKA, and CRUISE LINES INTERNATIONAL ASSOCIATION, Plaintiffs, v. **THE CITY AND BOROUGH OF JUNEAU, ALASKA, a municipal corporation, RORIE WATT, in his official capacity as City Manager,** Defendants.	Case No.: 1:16-cv-00008-HRH

CITY AND BOROUGH OF JUNEAU'S MOTION TO DETERMINE THE LAW OF THE CASE ON THE TONNAGE CLAUSE AND RIVERS AND HARBORS ACT AND TO STAY BRIEFING SCHEDULE AND DECISION ON THE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

CBJ's motion requests the Court determine the threshold issue as to the scope of federal law to be applied to the Plaintiffs'[1] constitutional challenge to any specific expenditures of fees collected by CBJ as a Marine Passenger Fee and a Port Development Fee (herein collectively referred to as "the fees."). This Motion is necessary because the parties disagree on the scope of federal law to be applied by the Court as to each challenged expenditure.

CBJ's motion is a pure question of law. It is not an opposition to CLIA's Summary Judgment Motion. The Court need not make any factual findings or factual rulings of any kind in order to determine this Motion on the threshold legal issue.

CBJ respectfully requests and proposes that this Motion be decided before any decision on CLIA's Summary Judgment Motion because the Court's decision on this Motion will define what law will apply to the Summary Judgment Motion. CBJ will file an opposition to CLIA's Summary Judgment Motion addressing the substantive issues, facts in dispute, and relief requested .[2]

CLIA claims that CBJ's collection and use of the fees are in violation of the Commerce Clause, Tonnage Clause, and Rivers and Harbors Appropriation Act of 1884, 33 USC §5 as amended by the Maritime Transportation Security Act of 2002, Pub. L.

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[1] This Motion will collectively refer to the Plaintiffs as "CLIA".

[2] The Court is aware the parties were involved in extended settlement discussions over many months and the Court approved a stay of all discovery during that time as well as granting requests for extensions on the pretrial dates. CBJ believes that a ruling on this motion before any further briefing on the Summary Judgment Motion may provide an impetus to the parties to resume settlement discussions.

107-295 (November 2, 2002). CLIA has specifically claimed that the fees cannot be used for services for passengers or crew, but may only be used for services directly tied to the physical vessel itself.[3] CLIA also claims the services must be provided to the vessel only, and to the exclusion of use by the public or available for use by the public.[4]

The Tonnage Clause does not require that the fees be used solely for services only benefitting the ships; it does not preclude the use of fees for services benefitting the passengers. The Tonnage Clause does not prohibit the use of fees for services benefitting the crew; the crew comes to Juneau in employ of the vessels. Both the crew and the passengers are an extension of the ship and services to the vessels or crew or passengers are constitutional.[5] The Tonnage Clause does not require that the projects benefitting passengers or vessels must exclude or be unavailable to the public. Similarly, the Rivers and Harbors Act as Amended was not intended to exclude the use of fees for projects benefitting cruise ship passengers. The Rivers and Harbors Act was not intended to exclude the use of fees for projects that benefit cruise ship passengers or cruise ships, which services or projects may also be available to the public or used by the public. Neither the Tonnage Clause nor the Rivers and Harbors Act require expenditures of the

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[3] While CLIA does not list this specifically in the Amended Complaint, it has claimed in numerous discovery responses (as well as in their Opposition to the Motion to Dismiss and in the Scheduling and Planning Conference Report) that the use of the fees to provide services to passengers and/or crew is unconstitutional if not related to the vessel.

[4] This interpretation of federal law being now advanced by CLIA also has developed from CLIA since the Amended Complaint was filed.

[5] See *Maher v. Port Authority*, "Tonnage Clause prohibits indirect tonnage duties, and consequently extends to taxes imposed not only on a vessel, but also on an owner, ship captain, supercargo, or the passengers...Though these people are obviously not ships, the Tonnage Clause prohibits taxes imposed on them because they are representatives of the ships.... The interests of these people are the same as the interests of the vessels they occupy..." 805 F. 3d. 98, 104 (3rd Cir. 2015) (Finding that the Clause did not extend to landside entities.)

fees only for the benefit of the vessels, and as such, expenditures for the services to the passengers that may not directly benefit the physical ship, are neither unconstitutional nor in violation of the Act.

This Motion seeks a ruling that neither the Tonnage Clause nor the Rivers and Harbors Act prohibit the use of fees to provide services to passengers and/or crew if the fees are based on a fair approximation of the costs of services and if the services do not place more than a small burden on interstate commerce. Whether the fees are a fair approximation of the costs of services and whether the services place no more than a small burden on interstate commerce are not issues to be decided in this motion. Those issues would only arise by a motion or at trial, and will require CLIA to identify the actual expenditures being challenged and provide the evidentiary basis to meet its burden of proof on those two issues.

This Motion raises a purely legal threshold question. The Court does not need to determine any facts or analyze or evaluate any facts. CBJ imposes a $5.00 Marine Passenger Fee pursuant to CBJ 69.20.020. The purpose of the fees and the direction for the expenditure of the fees are set out in CBJ 69.20.005 and CBJ 69.20.120. By Resolution, the CBJ collects a $3.00 Port Development Fee per arriving passenger. (See Paragraph 17 of Plaintiffs' Amended Complaint).

The legal issues for the Court to determine in this motion are:

1) Whether the Tonnage Clause permits the use of fees for services that benefit the passengers or the vessel;

2) Whether the Tonnage Clause permits the use of fees for services that benefit the passengers or vessel even if those services may be available to and/or used by the general public;

3) Whether the Rivers and Harbors Act limits the use of fees to services only provided to the vessel or if fees may properly be used only for services benefitting both the passengers and the vessel under the Act;

4) Whether the Rivers and Harbors Act limits the use of fees to services to the passengers and the vessel to the exclusion of use or availability of use by the public.

The decision on these issues will determine the law the Court will apply to the CLIA's Summary Judgment Motion, and from that, the law the Court will apply to evaluate any specific expenditures CLIA later, by subsequent motion or at trial, claims to be in violation of the Tonnage Clause.[6]

CBJ respectfully requests the Court hold that the Tonnage Clause and the Rivers and Harbors Act do not preclude the use of the collected fees to provide services or projects that benefit the passengers; do not require services to be used only for services that benefit both the passengers and vessels; and do not require the fees be used on services solely for the physical vessel. CBJ also respectfully request the Court hold that

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[6] CLIA's Summary Judgment motion requests the Court to hold as unconstitutional expenditures as to categories of services, not any actual expenditures challenged as unconstitutional. CLIA's motion assumes that CLIA's version of the federal law has already been decided, but it has not, and the parties dispute the scope of federal law under the Tonnage Clause and Rivers and Harbors Act. There is no necessity to analyze any individual expenditures or examples of expenditures to decide this motion.

that neither the Tonnage Clause nor the Rivers and Harbors Act require services which benefit the passengers or vessels to exclude or be unavailable to the general public.

Lastly, CBJ respectfully requests the Court hold in abeyance the briefing schedule on CLIA's Motion for Summary Judgment and decision on that motion until the Court has decided the scope of federal law to be applied.

II. THE TONNAGE CLAUSE DOES NOT PROHIBIT USE OF FEES TO PROVIDE SERVICES TO PASSENGERS

The Tonnage Clause states that "No State shall, without consent of Congress, lay and Duty of Tonnage."[7] This clause was enacted due to the desire of the federal framers to strengthen the Article 1 Section 2 Clause 2 prohibition on states to lay duties on imports or exports and to prevent states from "hiding" duties on goods by charging fees on the ships that were importing and exporting.[8]

"Duties of tonnage" is historically known as a levy upon the privilege of access to the ports by vessels or goods, and are distinct from fees or charges for services facilitating commerce, such as pilotage, towage, loading and unloading cargo, wharfage, storage, and similar.[9] [10]

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[7] USCS Const. Art. I, § 10, Cl 3. This clause was ratified in 1787.

[8] *Clyde Mallory Lines v. Alabama*, 296 U.S. 261, 265 (1935).

[9] *Clyde Mallory Lines,* at 265.

[10] Although the Clause describes "duty of tonnage," this has been clarified in case law to also include fees that are not based on the number of actual tons. The Clause may apply to per passenger fees depending on the services rendered. *Southern Steamship Co. v. Portwardens*, 73 U.S 31, 34-35 (1867)(finding a per ship fee unconstitutional where it was not used to provide any services nor used to offer any services); The Passenger Cases (*Smith v. Turner*, 48 U.S. 283, 458-459 (1849) (Transportation of passengers is part of commerce-no justification can be made between a transportation of merchandise and passengers; when the passengers come off the ship they are like merchandise and become mingled with the people of the state and then subject to local law; *Polar Tankers, Inc., v. City of Valdez,* discussed that a tonnage tax could exist where the tax is based on number of mariners, or number of passengers. 557 US 1, 8 (2009).

a. Fees used to provide services are not prohibited Tonnage Fees.

Tonnage fees are distinct from local port charges "for services rendered to vessels or cargoes."[11] The U.S. Supreme Court has ruled many times that fees for wharfage (landing, docking, and tying up for safety, as well as the loading or unloading of goods in a wharf[12]), were not considered Tonnage fees.[13] Fees are not limited to only wharfage; fees on ships are constitutional if they are used to provide services.[14] The Tonnage Clause does not prohibit fees for emergency services, police, or firefighters provided to the benefit of ships, which necessarily include the crew, cargo and passengers on those ships.[15] Fees have been found to be unconstitutional when the fees were not used to provide any services.[16]

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[11] *Cooley v. Board of Wardens*, 53 U.S. 299, 314 (1851).

[12] See the history of the term wharfage as discussed in *Trafikaktiebolaget Grangesberg Okelosund v. Wilkens*, 4 F.2d 577, 580-581, 1925 U.S. Dist. LEXIS 963, *10-14; wharfage includes a space for offloading cargo.

[13] *Keokuk Northern Packet Co.*, 95 U.S 80, 87-88 (1877) (holding that a wharfage fee charged to boats tied up on the wharf was not a tonnage fee as it was not charged to vessels just passing through, and as it paid for services); *Packet Co. v. St. Louise*, 100 U.S. 423 (1879) (involved a fee for wharfage on vessels and firewood, lumbar, logs brought to the port of St. Louis); *Packet Co. v. Catlettsburg*, 105 U.S. 559, 562 (1881) ("Nor is there any room to question the right of a city or town situated on navigable waters to build and own a wharf suitable for vessels to land at, and to exact a reasonable compensation for the facilities thus afforded to vessels by the use of such wharves, and that this is no infringement of the constitutional provisions concerning tonnage taxes and the regulation of commerce"); *Clyde Mallory Lines*, 296 U.S. at 66-67; *Transportation Co. v. Parkersburg*, 107 U.S. 691 (1882); *Ouachita River Packet Co. v. Aiken*, 121 U.S. 444, 448 (1887); *Vicksburg v. Tobin,* 100 U.S. 430 (1879)).

[14] *Huse v. Glover*, 119 U.S. 543(1886) (fees used to pay for locks on a navigable river); *Morgan's Steamship Co., v. Board of Health*, 118 U.S. 455 (1886) (fees for medical inspection and quarantine).

[15] *Plaquemines Port, Harbor, and Terminal District v. Federal Maritime Commission* (Plaquemines I), 838 F.2d 536, 545 n. 8 (D.C. Cir. 1988); *New Orleans Steamship Association v. Plaquemines Port Harbor & Terminal District*, 874 F.2d 1018, 1023 (5th Cir. 1989) (Plaquemines II) cert denied, 495 U.S. 923 (1990).

[16] See *S.S. Co. v. Portwardens*, 73 U.S. 31, 34 (1867) ("But in this case before us there were no services and no offer to perform any."); *Inman S.S. Co. v. Tinker*, 94 U.S. 238, 243 (1876) (Finding that the fees in that case were "not exacted for any services rendered or offered to be rendered. If the vessel enter the port and immediately take her departure, or load or unload, or make fast to every wharf, either of these things disjunctively brings her within the act, and makes her liable to the burden prescribed."); See also *State Tonnage Cases,* 79 US 204, 220 (1870)("[T]he act under consideration is emphatically an act to raise revenue to replenish the treasury of the State and for no other purpose, and does not contemplate any beneficial service for the steamboats or other vessels subject to taxation.")

b. There is an established test to evaluate the constitutionality of fees.

Charges levied to defray the cost of regulation or facilities afforded in aid of interstate or foreign commerce have consistently been held to be permissible.[17] The test for constitutionality of a fee is set out in *Clyde Mallory Lines:* A fee is constitutional if: 1) the service funded by the fee enhances the safety and efficiency of interstate and foreign commerce; (2) the fee is used to pay for the service provided or available; (3) the fee places no more than a small burden on interstate and foreign commerce.[18]

Courts in applying this test should look at the essence and object of the fee.[19] The District of Northern Indiana Court explained that a city or state "may charge vessels for wharfing at the public terminal or for other services it provides," including "conveniences," but that was not the case where the state charge was for entering a harbor that was operated and improved by the federal government.[20]

The U.S. Supreme Court affirmed the *Clyde Mallory Lines* test in *Polar Tankers, Inc., v. City of Valdez.*[21] The Supreme Court found that the fee imposed on large oil tankers was unconstitutional, because the fee on the tankers was "designed to raise revenue used for general municipal services," did not provide any services, and created a

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[17] *Clyde Mallory Lines*, at 267.

[18] *Clyde Mallory Lines* as described in *New Orleans S.S. Ass'n v. Plaquemines Port, Harbor & Terminal Dist.*, 874 F.2d 1018, 1021-1022, (5th Cir. 1989), *cert denied*, 495 U.S. 932 (1990).

[19] *Indiana Port Com. v. Bethlehem Steel Corp.*, 653 F. Supp. 604, 610, (N. D. Indiana, 1987) (when evaluating the essence and object of the fee, "if it is a charge for services rendered or conveniences provided, it is not a duty of tonnage.")

[20] *Indiana Port Com. v. Bethlehem Steel Corp.*, 653 F. Supp. 604, 610 (N. D. Indiana, 1987).

[21] 557 U.S. 1, 8, 11 (2009).

property tax that was not taxed in the same manner as other property in the community.[22] The fee at issue in the *Polar Tankers* case was not like CBJ's fees. More importantly, unlike the CBJ, Valdez did not use the fees to provide any services to the vessel or passengers.[23]

c. *The fee does not need to be used by every payer of the fee.*

A constitutional fee does not have to be a fee for a service that is used by every payer of the fee. Fees are constitutional if they create the availability of the service.[24] In *Clyde Mallory Lines,* the Court specifically found that a fee for a general service of securing benefits and protection of the rules of shipping in the harbor was not a prohibited Tonnage fee, where the fee was used to "protect and facilitate traffic," and did not impede the free-flow of commerce.[25] The Court found it did not matter if the service was one used by all the ships or just available to them, finding that it is not less a service beneficial to vessels just because the vessels have not been given special assistance, rather that the benefits that flow from protecting and facilitating traffic in the busy harbor were a benefit to all.[26] The use of the fees in this manner was not within the historic meaning of "duty of tonnage," nor a constitutional prohibition.[27]

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[22] *Id.* at 10, 12.

[23] Valdez also argued that it was not a Tonnage duty because it was a "value-related tax on personal property" which the court disagreed, as the tankers were not "taxed in the same manner as the other property of the citizens." *Id.* at 11-12.

[24] *Clyde Mallory Lines*, 296 U.S. at 266.

[25] *Id.* at 266-267.

[26] *Id.* at 264, 266-267.

[27] *Id.* at 267.

The constitutional principles were more recently confirmed in *New Orleans Steamship Association v. Plaquemines Port Harbor & Terminal District.*[28] The fee in that case involved a charge per ton of ship cargo to finance emergency response services.[29] The Court discussed that fees to raise general revenues, regulate trade, or charge for entering a port could be prohibited, but expressly held that the payment of the fee was to "insure that emergency services will be available," that the fee is for "assurance of its availability," and that did not violate the Tonnage Clause.[30] A fee to ensure services are available is not unconstitutional even if every ship does not need the service or a ship chooses not to use the service.[31]

d. Fees are not unconstitutional because they are used to fund services to passengers.

One of the earliest Tonnage Clause cases described that a fee was not a tonnage fee it if was used to provide services provided to "cargoes" of a vessel.[32] At the simplest form, cruise ship passengers are the cargos of the cruise ships. This is true for several reasons. First, the Tonnage Clause applies to fees that act as duties on goods; in order for the Tonnage Clause to apply to this case where the fees are charged per passenger, the passengers must be considered the cargo of the ships. Secondly, the cruise ship

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[28] 874 F.2d 1018, 1023 (5th Cir. 1989) (Plaquemines II) *cert denied*, 495 U.S. 923 (1990).

[29] *Id.*

[30] *Id.* at 1023. (The court also found that the fees did not violate the Harbor and Development Navigation Improvement Act, which was a law that required non-federal ports to help plan ports and harbors and to pay part of the costs, which can be accomplished by harbor fees. *Id.* at 1024-1025.)

[31] *Id.*

[32] *Cooley v. Board of Wardens*, 53 U.S. 299, 314 (1851).

passengers arrive on-board ships and generally leave on-board the ships, they would not be in Juneau if not for being provided passage on the ships; the ships do not have other "cargo" that they offload in Juneau.[33] The ships exist to make a profit from the cruise ship passengers; the passengers are the articles of commerce.[34] Services provided to the passengers benefit the vessel and therefore CLIA's members because the vessels have no function other than to bring passengers to Juneau; the cruise ship companies make their profits off the passengers. Services to passengers (the cruise ship companies' articles of commerce) may be found to be services that enhance the safety and efficiency of interstate and foreign commerce for the vessel and CLIA members; therefore services to passengers are not per se unconstitutional under the Tonnage Clause or Rivers and Harbors Act.

If services rendered to cargo of vessels are not considered an unconstitutional "Duty of Tonnage," fees for services to passengers also are not. Although this analysis accurately sets out the connection between the passengers and commerce, the Court does not need to rely on this analysis, as there are prior cases that have considered and upheld fees for services to passengers of vessels.

In 1886, a fee used to pay for a quarantine inspection and detention of steam ship passengers was found constitutional, where the fees were used to buy land, build

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[33] With the exception of garbage offloaded in Juneau from the ships; this is not an item or article of commerce brought to Juneau.

[34] See *Smith v. Turner*, 48 U.S. 283, 458-459 (1849) (Transportation of passengers is part of commerce; when the passengers come off the ship they are like merchandise and become mingled with the people of the state and then subject to local law.)

hospitals, and buy supplies for the quarantine station, even where the excess was collected and saved in an account devoted to future expenses.[35] The fees paid for inspections to determine "the healthy or diseased condition of their passengers" and provided for the quarantine station which provided "treatment of diseased passengers and for the comfort of their companions, as well as the cleaning and disinfecting of the vessels."[36] The purchased land and hospital was not attached to the vessel or a benefit of the physical vessel. The court explained the test was to look at the operation and effect of the statute to determine its purpose, and make sure the statute was not intended to invade the federal authority in a roundabout way.[37]

More recently, the 9th Circuit found fees constitutional where the fees were used to provide services to passengers such as public restrooms, parking, trash disposal, and security even when these facilities were also open to the public.[38] The Court specifically found that these were services in exchange of the fees, survived the *Clyde Mallory Lines* test, and that it did not matter if the public also occasionally used these services.[39]

There are several other recent Hawaii cases with constitutional fees used to for pay for services to boating passengers. In 2001, the Federal District Court of Hawaii found constitutional a fee requiring payment of a percentage of gross receipts for tour boats paid to one state agency, above and beyond a commercial permit fee and a mooring permit

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[35] *Morgan's S.S. Co. v. Louisiana Bd. of Health,* 118 U.S. 455 (1886).

[36] *Id.* at 460-461.

[37] *Id.* at 462.

[38] *Barber v. Hawaii,* 42 F.3d 1185, 1196 (9th Cir. 1994).

[39] *Id.*

paid to another state agency for use of their dock.[40] The fee was used for harbor maintenance and improvement and also for services to passengers, specifically finding that passengers of the boat had access to the facilities, including restrooms, parking, and security lights, regardless of whether the boat or passengers actually used it.[41] [42] This was true even though the fees collected were higher than the direct costs of the facilities; the court found that the fees could be used for services provided by the central office such as accounting, legal, management, and other support services which the facility benefitted from.[43] [44]

Another Hawaii District Court case found that fees for facilities used by boat passengers, such as restrooms, and parking, as well as fees to pay for trash disposal and security, were not duties of tonnage because they provided services to the boating passengers.[45]

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[40] *Captain Andy's Sailing, Inc. v. Johns*, 2001 U.S. Dist. LEXIS 26105, *43-45, 195 F. Supp. 2d 1157, (Dist. Hawaii 2001).

[41] *Id.* at 44-45.

[42] The Court found that a separate fee was unconstitutional because there was no specific service readily perceptible to the boats operating in the waters that the fee was imposed for, because no records were shown of the regulatory activity that was supposedly being paid for and no accounting costs. *Id.* at 39-43. (The state did not provide evidence of the costs incurred by the state agency for the supposed services, nor any evidence of the relationship of the costs of those services to the fee. *Id.* at 12. The fee charged by the one state agency explicitly said it was for the "privilege of operating" the boat in a certain recreation management area. *Id.* at 13. The agency argued the fees were for ecosystem preservation, but did not have any studies or assessments relating to the impacts of the boating activities. *Id.* at 13-14. The funds were pooled with funds from other parts of Hawaii, into a single fund, which were used in part for operational services and there had not been an effort made to segregate expenses. *Id.* at 15.)

[43] *Id.* at 45.

[44] CBJ believes that support services for the passengers or vessels may be provided by a local municipality's various departments even when the department does not track each individual use or service; that issue is beyond this motion to determine the law of the case and CBJ does not seek a ruling on that at this time.

[45] *Hawaii Navigable Waters Preservation Society v. Hawaii,* 823 F. Supp. 766, 776 (D. Hawaii, 1993).

The 2nd Circuit in a 2008 case upheld a decision that evaluated whether fees were constitutional by evaluating the services provided to the passengers.[46] The question was not what services were provided only to the vessels, but the court instead found that fees for services unavailable to passengers were not constitutional, whereas fees for services available to passengers were constitutional.[47] [48] The list of expenditures that benefitted passengers included a new ferry terminal building with public restrooms and public waiting area, which the court noted directly benefitted passengers by providing shelter and services which the court found constitutional.[49] Other fees that benefitted passengers were dock repairs, construction of an access road which made accessibility more safe for passengers, a paid parking lot, security for the dock, and cleaning of facilities.[50] Although the *Bridgeport* court eventually ruled the passenger fees were unconstitutional because they were in excess of the services "available for use" to passengers, it did not rule that fees fairly approximated to the costs of services provided to passengers would

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[46] *Bridgeport and Port Jefferson Steamboat Company v. Bridgeport Port Authority,* 566 F.2d 81 (D. Conn. 2008), affirmed, *Bridgeport and Port Jefferson Steamboat Company v. Bridgeport Port Authority,* 567 F.3d 79 (2nd. Cir. 2009).

[47] *Bridgeport,* 566 F.2d at 88-92; *Bridgeport,* 567 F.3d at 84-85.

[48] CBJ notes that Thompson Coburn, the same law firm representing CLIAA in this case, represented the Port Authority in that case and argued that fees that covered all the services and facilities of the port, even those unavailable to the ferry passengers and the vessel, were constitutional. CBJ is unable to explain the inconsistent position they argue now that services to passengers are unconstitutional, as there have been no cases decided since *Bridgeport,* under the Tonnage Clause or RHA, that provide a different interpretation than applied by the District Court and Second Circuit in *Bridgeport.* Thompson Coburn also argued in *Bridgeport* that the Authority could constitutionally use the fees to defend the lawsuit brought against the Authority. CBJ will address the substance of Thomson Coburn's about face on this issue in its opposition to the Motion for Summary Judgment.

[49] 566 F.2d at 89; 567 F.3d at 84

[50] 566 F.2d at 89-90; 567 F.3d at 84.

not be constitutional.[51] The court did not prohibit all fees or the use of all the fees, but directed the Port to calculate the cost of the services actually available to the ferry passengers[52] to ensure that it charged an appropriate and non-excessive fee.[53] There was no discussion in the case about limiting constitutional services to only the vessel.

The threshold question presented here was never addressed in *Bridgeport* because the parties did not dispute that the Authority could use the fees for the benefit of the passengers, even if those fees did not directly benefit the vessels, and the parties did not dispute that the fees could be used for services that may also be available to the general public.[54]

The above cases all upheld fees that were used for passengers but also available to the public. It would be illogical to claim that the Tonnage Clause prohibits the use of fees to maintain restrooms on a public or private dock where the cruise ships dock for the cruise passengers because non-cruise passenger persons may wander by and use the restroom.

The test in *Clyde Mallory* lines applies to services benefiting the passengers or the cruise ships, and applies to services that are available to the passengers, not just services

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[51] 566 F.2d at 97-98, 100.

[52] The fees in *Bridgeport* were used to pay the entire Port Authority budget, including the funding of services that had no relationship to the ferry or passengers, as well as for the funding of areas off-limits to the passengers. The facts in that case are not similar to our case, where the fees have only been used to provide services available to the ships and/or passengers.

[53] 566 F.2d at 107.

[54] *Bridgeport and Port Jefferson Steamboat Company v. Bridgeport Port Authority,* 566 F.2d 81 (D. Conn. 2008), affirmed, *Bridgeport and Port Jefferson Steamboat Company v. Bridgeport Port Authority,* 567 F.3d 79 (2nd. Cir. 2009).

actually used. A fee is also not prohibited because it pays for a service available to ships or passengers and also available to the public.[55] The constitutionality of fees such as CBJ's has been analyzed by the Courts on the basis of whether the fees are used for services to the ships or passengers or available to the ships or passengers. None of the cases decided to date have found unconstitutional the use of fees for services to passengers that do not also benefit the vessel; or for services to the passengers or vessel that are also available for use by the public.

CLIA's interpretation of the scope of federal law under the Tonnage Clause disrupts a historical volume of case law that reaches back over 150 years, and in which none of those cases interpret the scope of federal law consistent with CLIA's position. CLIA's interpretation of the scope of federal law would create a new test under the Tonnage Clause - a new test that has not been provided for in any existing case nor expressed in the intent of the Tonnage Clause.

III. THE RIVERS AND HARBORS ACT DOES NOT PROHIBIT SPENDING OF THE FEES FOR SERVICES USED BY OR AVAILABLE FOR USE TO PASSENGERS

Section 4 of the Rivers and Harbors Appropriations Act of 1884 prohibits all tolls or operating charges for passing through any work for the use and benefit of navigation

[55] See *Barber*, 42 F.3d at 1996 ("Although the general public may occasionally use the services, the affiants use the services on a regular basis.")

which was acquired or constructed or otherwise belongs to the United States.[56]

The 2002 amendments to the Rivers and Harbors Act were brought into law with the Maritime Transportation Security Act of 2002, under 107 Public Law 295, on November 25, 2002.[57] The Act's many provisions deal with security and the Coast Guard,[58] but the addition of Section 445 of 107 Public Law 295 amended 33 U.S.C. 5 by adding section (b):

> **(b)** No taxes, tolls, operating charges, fees, or any other impositions whatever shall be levied upon or collected from any vessel or other water craft, or from its passengers or crew, by any non-Federal interest, if the vessel or water craft is operating on any navigable waters subject to the authority of the United States, or under the right to freedom of navigation on those waters, except for--

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[56] 33 USC 5 as cited in *Indiana Port Comm. v. Bethlehem Steel Corp*, 653 F. Supp. 604, 610 (Dist. N. Indiana, 1987) affirmed on appeal, *Indiana Port Comm. v. Bethlehem Steel Corp.*, 835 F. 2d 1207, 1210 (7th Cir. 1987) (Finding that the Rivers and Harbors Act applied to a harbor built with a substantial amount of federal money, where the state agreed the harbor would become a federal project, where the federal government had the right or real and beneficial uses of the harbor, and where the federal government was responsible for maintenance and repair of the harbor.)

[57] The original purpose of the bill was to establish a program for greater security for United States seaports. STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS, 147 Cong Rec S 8015, 8015, Sen. Hollings, July 20, 2001, 147 Cong Rec. S. 8015. The initial Senate version did not include the language of 33 USC 5(b). 147 Cong Rec. S. 8015. It was supported by Alaska Senators Stevens and Murkowski. TEXT Amendments, 147 Cong. Rec. S. 11444. The bill extended the gross tax rate that the federal government required for tonnage. PORT AND MARITIME SECURITY ACT OF 2001, 147 Cong Rec S 13871, 13875 (Sen. Hollings: "Our bill will provide $219 million over four years directly to these important national security functions. Cargo ships currently pay a tax on the gross registered tonnage the ship can carry. That tax rate, in current law, is scheduled to decline beginning in 2003. Our bill will simply extend the existing tax rate-which has been imposed since 1986-until 2006.)

The bill was carried over into a second session, and the House described the goal of the act as: to deter terrorist attacks against ocean shipping without adversely affecting the flow of U.S. commerce through our ports. CONFERENCE REPORT ON S. 1214, MARITIME TRANSPORTATION SECURITY ACT OF 2002, 148 Cong Rec H 8809, 8809.

[58] The cases post- Maritime Transportation Security Act of 2002 highlight the security focus of the Act. See *International Marine Terminals Partnership v. Port Ship Service, Inc.*, 865 So. 2d 199, 204 (La. App. 2003), that this addition is "intended to prevent unauthorized personnel from accessing the nation's vital shipping interests." See also *Murphy Marine Services, Inc. v. Brittingham*, involving employment benefits, which describes the statute as preventing individuals from access secure areas of ports without a "TWIC" card. 19 A.3d. 302 (Del. 2011). "TWIC" cards are required to access Juneau's docks when cruise ships are docked; this limits access to the docks by the public.

(1) fees charged under section 208 of the Water Resources Development Act of 1986 (33 USC 2236); ~~or~~

(2) reasonable fees charged on a fair and equitable basis that--

> **(A)** are used solely to pay the cost of a service to the vessel or water craft;
> **(B)** enhance the safety and efficiency of interstate and foreign commerce; and
> **(C)** do not impose more than a small burden on interstate or foreign commerce~~.~~,[59] [60]

The amendment to the Rivers and Harbors Act shows up in the second session on the Transportation Security Act.[61] This version was presented by Alaska Congressman Young, based on a House committee amendment and described as:

> The Conference substitute prohibits any non-Federal interest from assessing or collecting any fee on vessels or water craft operating on navigable waters subject to the authority of the United States, or under the freedom of navigation on those waters. This section does not prohibit those instances in which Federal law has permitted the imposition of fees and recognizes those circumstances under which non-Federal interests may charge reasonable port and harbor fees for services rendered.[62]

Congressman Young from Alaska made remarks about this section to the Act, during the last presentation before the signing by the President:

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[59] MARITIME TRANSPORTATION SECURITY ACT OF 2002, 107 P.L. 295, Title VI section 445, November 25, 2002, 116 Stat. 2064, 2133, 107 P.L. 295, 2002 Enacted S. 1214, 107 Enacted S. 1214.

[60] The struck out text is text that was revised in 2003, Pub. L. 108-176, title VIII, section 829(a), December 12, 2003, 117 Stat. 2597. This expanded Section 5(b) in a miscellaneous provision titled "navigation fees" of the Vision 100-Century of Aviation Reauthorization Act" to take out the "or" in paragraph 1, and add "or" after the end of paragraph 2, and allow for fees for: "property taxes on vessels or watercraft, other than vessels or watercraft that are primarily engaged in foreign commerce if those taxes are permissible under the United States Constitution." Pub. L. 108-176, title VIII, section 829(a), December 12, 2003, 117 Stat. 2597.

[61] CONFERENCE REPORT ON S. 1214, MARITIME TRANSPORTATION SECURITY ACT OF 2002, 148 Cong Rec H 8561, 8580.

[62] MARITIME TRANSPORTATION SECURITY ACT OF 2002, 148 Cong Rec H 8561, 8590.

> I would like to point out a particular concern that is addressed in Section 445 of the conference agreement. Section 445 addresses the current problem, and the potential for greater future problems, of local jurisdictions seeking to impose taxes and fees on vessels merely transiting or making innocent passage through navigable waters subject to the authority of the United States that are adjacent to the taxing community. We are seeing instances in which local communities are seeking to impose taxes or fees on vessels *even where the vessel is not calling on, or landing, in the local community. These are cases where no passengers are disembarking*, in the case of passenger vessels, or no cargo is being unloaded in the case of cargo vessels and where the vessels are not stopping for the purpose of receiving any other service offered by the port. In most instances, these types of taxes would not be allowed under the Commerce Clause of the United States Constitution. Unfortunately, without a statutory clarification, the only means to determine whether the burden is an impermissible burden under the Constitution is to pursue years of litigation.
>
> Section 445 of the Conference Report addresses this problem by clarifying the sole circumstances when a local jurisdiction may impose a tax or fee on vessels. Local governments, and other non-Federal interests, may impose taxes or fees only under an existing exception under the Water Resources Development Act or under extremely limited circumstances in which reasonable fees can be charged on a fair and equitable basis for the cost of service actually rendered to the vessel. The fees must also enhance the safety and efficiency of interstate and foreign commerce and represent at most a "small burden" on interstate and foreign commerce. Generally, taxes will not be allowed under this section. The sole exceptions are stated in Section 445.[63]

The remarks by Congressman Young do not discuss a situation of fees such as those imposed by CBJ and used for services to cruise ship passengers and/or vessels. In fact, Congressman Young's spokesperson in 2003 in response to then Governor Murkowski's concerns on the Act stated that "it was never intended to block state or local governments from imposing a head tax on docking ships," that instead the amendment was added because Yakutat had been trying to impose a head tax from ships that enter the Yakutat

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[63] CONFERENCE REPORT ON S. 1214, MARITIME TRANSPORTATION SECURITY ACT OF 2002, 148 Cong Rec E 2143, 2143-2144. *(Emphasis added.)*

Bay even those that did not dock.[64] The fees imposed by CBJ are not imposed on vessels that do not come to the Port. Congressman Young's remarks make clear that the purpose of the amendment was to solidify the requirements to comply with the Commerce Clause and Tonnage Clause, not create new substantive law.

In 2003, Section 5(b) was expanded in a miscellaneous provision titled "navigation fees" of the Vision 100-Century of Aviation Reauthorization Act" to add subsection (3)[65], which allowed "property taxes on vessels or watercraft, other than vessels or watercraft that are primarily engaged in foreign commerce if those taxes are permissible under the United States Constitution."[66] The reason for this change in 2003 was described as:

> The legislation includes a section that amends section 4(b) of the Rivers and Harbors Appropriations Act of 1884 to clarify that the restriction in that section with respect to taxes on vessels or other water craft does not apply to property taxes on vessels or water craft, other than vessels or water craft that are primarily engaged in foreign commerce, so long as those taxes are constitutionally permissible under long-standing judicial interpretations of the Commerce Clause. To assure the consistent application of legal principles concerning non-Federal taxation of interstate transportation equipment, the amendment in this section is effective as of November 25, 2002. Over the years, the U.S. Supreme Court has ruled on the constitutionality of property taxes on various forms of interstate and international transportation equipment in a number of cases, including but not limited to Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18 (1891) (railroad rolling stock); Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169 (1949)

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[64] See Associated Press Article, "Governor, Congress members differ on head tax limit," Peninsula Clarion (April 25, 2003), available at: **http://peninsulaclarion.com/stories/042503/ala_042503ala007001.shtml#.WffBbGhSyAs/** (last visited October 30, 2017). Per Local Rule 7.1(d) a separate motion for judicial notice of an exhibit is only needed when a document is not readily available to the public in printed form or the internet. Exhibit A attached to this document is publicly available online and properly subject to judicial notice.

[65] And also take out the "or" in paragraph 1, and add "or" after the end of paragraph 2.

[66] Pub. L. 108-176, title VIII, section 829(a), December 12, 2003, 117 Stat. 2597.

(barges on inland waterways); and Braniff Airways, Inc. v. Nebraska State Board of Equalization, 347 U.S. 590 (1954) (domestic aircraft); Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977); and Japan Line v. County of Los Angeles, 441 U.S. 434 (1979). This line of decisions has sustained property taxes in interstate transportation cases when the tax is applied to an activity with a substantial nexus with the taxing entity, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the taxing entity. The exception for state and local taxes on vessels or watercraft that are primarily engaged in foreign commerce implements the holding of the Japan Line case. The committee notes that section 4(b) does not affect whether sales or income taxes are applicable with respect to vessels. The purpose of section 4(b) was to clarify existing law with respect to Constitutionally permitted fees and taxes on a vessel, but also to prohibit fees and taxes imposed on a vessel simply because that vessel sails through a given jurisdiction.[67]

This amendment did not prohibit the use of fees for services to passengers or crew.

There are a small group of cases nationwide that discuss the Rivers and Harbors Act as amended in 2002 and 2003, none of which preclude fees because they were spent on services provided to passengers. These cases also do not preclude fees that were spent on services to vessels or passengers because the services did not exclude the public.

Bridgeport, as discussed in the section above, acknowledged a lack of case law on the RHA, and found that the addition of Section 5(b) was intended to clarify not change the existing jurisprudence, and did not alter their analysis as to the constitutionality of the fees; the fees were analyzed based on what services benefitted the ferry passengers.[68] The Third Circuit in *Maher Terminals, LLC v. The Port Authority of New York and New*

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[67] 108 H. Rpt. 240; 108. H. Rpt. 334.

[68] *Bridgeport and Port Jefferson Steamboat Company v. Bridgeport Port Authority,* 566 F. Supp. 2d 81, 103 (D. Conn. 2008).

Jersey, similarly recognized that the RHA only codified[69] the existing case law on the Tonnage Clause.[70] The Alaska Supreme Court in *Alaska Department of Natural Resources v. Alaska Riverways*, also stated that the RHA codified the common law concerning the Tonnage Clause; fees for the use of navigable waters were prohibited unless the fees did not impose a significant burden on interstate commerce and represented a fair approximation of the benefit conferred or cost incurred by the charging authority.[71] That court found that the fees in question were unconstitutional because they were not based on a benefit conferred or cost incurred, and pointed out that "[t]he State has not argued that it provides facilities or services to Alaska Riverways or its passengers."[72] [73]

The Rivers and Harbors Act as Amended does not prohibit fees used to provide services to passengers. The Rivers and Harbors Act as Amended also does not prohibit fees used to provide services to passengers or ships that do not exclude the public.

VI. CONCLUSION:

CBJ respectfully requests the Court to hold as a matter of law:

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[69] CBJ does not concede that the RHA "codified" the Tonnage Clause. That issue has not been determined by the United States Supreme Court. Such references to the cases discussed in this section show those courts did not decide that as a legal issue, but rather made that comment in dicta or for the Court's decision not to further analyze the case after deciding the issues under the Tonnage Clause.

[70] 805 F.3d 98,111 (3rd Cir. 2015) (Finding that the landside entity did not have protection under the Tonnage Clause or the Rivers and Harbors Act).

[71] 232 P.3d 1203, 1222 (Alaska 2010).

[72] *Id.*

[73] Two fairly recent cases in Tennessee found taxes paid by rafting operators and other boaters were in violation where the government admitted that the taxes were not used solely to provide services used by the taxpayers and instead argued that the fees did not apply to that waterway. *Moscheo v. Polk County*, 2009 Tenn. App. LEXIS 602 *28, 2009 WL 2868754; *High Country Adventures, Inc. v. Polk County*, 2008 Tenn. App. LEXIS 651 *28 (Tenn. Ct. App. Sept. 2, 2009).

1. The use of the CBJ Marine Passenger and Port Development Fees to provide services that benefit the passengers are not unconstitutional under the Tonnage Clause, even if the services do not directly benefit the vessels. The test as to each challenged expenditure is whether the fees are a fair approximation of the cost of the services provided to the passengers and whether the fees impose no more than a minimal burden on interstate commerce.[74]
2. The CBJ Marine Passenger Fees and Port Development Fees may be used to provide services to the passengers or the vessels, and the Tonnage Clause does not constitutionally limit the use of fees to services that benefit both the passengers and the vessel.
3. The CBJ Marine Passenger and Port Development Fees may be used to provide services to the passengers or the vessels even if the services may be available to the public, and the Tonnage Clause does not limit the use of fees to services that exclude use of the public.
4. The use of the CBJ Marine Passenger and Port Development Fees to provide services that benefit the passengers does not contravene the Rivers and Harbors Act, even if the services do not directly benefit the vessels. The test as to each challenged expenditure is whether the fees are a fair approximation of the cost

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[74] CLIA has the burden of proof to prove this for each specific expenditure alleged to be unconstitutional.

of the services provided to the passengers and the fees to do not impose more than a minimal burden on interstate commerce.[75]

5. The CBJ Marine Passenger and Port Development Fees may be used to provide services to the passengers or the vessels, and the Rivers and Harbors Act does not limit the use of fees to services that benefit both the passengers and the vessel.
6. The CBJ Marine Passenger and Port Development Fees may be used to provide services to the passengers or the vessels even if the services may be available to the public, and the Rivers and Harbors Act does not limit the use of fees to services that exclude use of the public.

This threshold legal issue – defining the scope of law to be applied in this case in analyzing specific expenditures challenged by CLIA – should be decided by the Court before ruling on CLIA's Motion for Summary Judgment. In addition to entering an order that interprets the scope of federal law outlined in this Conclusion section, CBJ respectfully requests the Court enter an order staying the briefing on the Motion for Summary Judgment until the Court decides the scope of federal law as presented in this motion, and hold a status conference to set a new briefing schedule on the Motion for Summary Judgment after the Court's decision on this Motion.

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[75] CLIA has the burden of proof to prove this for each specific expenditure alleged to be unconstitutional.

HOFFMAN & BLASCO, LLC

Dated: October 30, 2017

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CERTIFICATE OF SERVICE

The undersigned certifies that on October 30, 2017 a true and correct copy of the foregoing **CITY AND BOROUGH OF JUNEAU'S MOTION TO DETERMINE THE LAW OF THE CASE ON THE TONNAGE CLAUSE AND RIVERS AND HARBORS ACT AND TO STAY BRIEFING SCHEDULE AND DECISION ON THE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** was served on the following parties of record via ECF and U.S. First Class Mail.

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